No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., *et al.*,

Petitioners,

v.

FRANK VARELA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Decision Below Patently Violates The FAA 4

A. The Decision Below Is A "Palpable Evasion" Of *Stolt-Nielsen* 7

B. The Panel Decision Also Runs Afoul Of The Liberal Federal Policy Favoring Arbitration 9

II. Summary Reversal Is Warranted 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

CASES

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 9

Agostini v. Felton,
521 U.S. 203 (1997) 12

American Express Co. v. Italian Colors Restaurant,
570 U.S. 228 (2013) 1, 4

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) ..... *passim*

Citizens Bank v. Alafabco, Inc.,
539 U.S. 52 (2003) 11

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 4, 6

CompuCredit Corp. v. Greenwood,
565 U.S. 95 (2012) 11

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 2, 6

DirecTV, Inc. v. Imburgia,
136 S. Ct. 463 (2015) 8, 10, 11, 12

Cited Authorities

Page

Dudley v. Stubbs,
489 U.S. 1034 (1989) 11

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 4

Kindred Nursing Ctrs. v. Clark,
137 S. Ct. 1421 (2017) 3, 8, 11

KPMG LLP v. Cocchi,
565 U.S. 18 (2011) 3, 11

Marmet Health Care Ctr. v. Brown,
565 U.S. 530 (2012) 11

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 5

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 5, 9

Moses H. Cone Mem'l Hosp. v.
Mercury Constr. Corp.,
460 U.S. 1 (1983) 4

Nitro-Lift Techs., L.L.C. v. Howard,
568 U.S. 17 (2012) 3, 11

Cited Authorities

Page

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013) 1

Perry v. Thomas,
482 U.S. 483 (1987) 4

Preston v. Ferrer,
552 U.S. 346 (2008) 6, 9

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 12

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 4

Schweiker v. Hansen,
450 U.S. 785 (1981) 11

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) ..... *passim*

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 2, 5

STATUTES AND OTHER AUTHORITIES

9 U.S.C. § 2 4

Cited Authorities

Page

Sup. Ct. R. 37.6 1

Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103 (2011).....6

Eugene Gressman *et al.*, Supreme Court Practice (9th ed. 2007).....11

Larry R. Leiby, *Class Arbitrations Under Attack—But Survive*, 7 No. 1 Journal of the American College of Construction Lawyers (Jan. 2013).....6

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief.

less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

Amicus thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence and, in particular, the FAA's "two goals"—"enforcement of private agreements and encouragement of efficient and speedy dispute resolution." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the fundamental precepts of the FAA is that "arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also Volt*, 489 U.S. at 478-79 (underscoring the congressional goal of "ensuring that private arbitration agreements are enforced according to their terms"). Consistent with that baseline precept, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. at 684. Courts and arbitrators thus may not infer "[a]n implicit agreement to authorize class-action arbitration ... solely from the fact of the parties' agreement to arbitrate." *Id.* at 685.

But that is precisely what the Ninth Circuit panel majority (Reinhardt & Wardlaw, JJ.) did in this case. The majority held that class arbitration was required, notwithstanding the fact that there was no contractual basis for doing so. To be sure, the panel purported to rely on language within the arbitration agreement. But that contract language did nothing more than replace litigation with arbitration as the parties' agreed-upon mechanism for dispute resolution by waiving the right to go to court and resolve disputes via trial. That is, the relevant contract language did precisely what any garden-variety arbitration agreement does: it waived "the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. v. Clark*, 137 S. Ct. 1421, 1427 (2017).

Judge Fernandez (in dissent) described the panel's decision as a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. This is an apt description. But the decision is even worse than that. By forcing class procedures on the parties, the panel robbed the parties of the advantages of arbitration as envisioned by the FAA, thereby running afoul of the "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Summary reversal is warranted here. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam). The decision below is clearly erroneous; the panel's evasion of *Stolt-Nielsen* is precisely the type of hostility toward arbitration the FAA was meant to eradicate; the decision threatens to undermine the enforcement of arbitration agreements throughout the

Ninth Circuit; and, if left uncorrected, the decision may green-light other circuits to engage in similar hostility against the FAA.

ARGUMENT

I. The Decision Below Patently Violates The FAA.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," by enacting the FAA. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). The FAA codified a "national policy favoring arbitration" and "place[d] arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 232 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

Section 2 is the FAA's centerpiece. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2; *see also Perry v. Thomas*, 482 U.S. 483, 489 (1987). Section 2 "create[s] a body of federal substantive law of arbitrability," *id.*, a "principal purpose" of which is to "ensur[e] that private

arbitration agreements are enforced according to their terms," *Volt*, 489 U.S. at 478-79.

Consistent with this purpose and the consensual nature of arbitration, parties "are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (quotation omitted). And courts and arbitrators must "give effect to the[ir] contractual rights and expectations," *Volt*, 489 U.S. at 479. Accordingly, parties may (and often do) agree on the issues they choose to arbitrate, the forum in which the arbitration will take place, the rules under which arbitration will proceed, and who will resolve specific issues. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Volt*, 489 U.S. at 479; *Stolt-Nielsen*, 559 U.S. at 683.

As the Court explained in *Stolt-Nielsen*, parties also "may specify *with whom* they choose to arbitrate their disputes." 559 U.S. at 683. Because courts and arbitrators must "give effect to the intent of the parties ... it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for [doing so]." *Id.* at 684. And because the shift from bilateral to class arbitration interferes with the fundamental attributes of arbitration as envisioned by the FAA, the Court explained, "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* at 685. To so presume would violate the FAA's purpose of ensuring that arbitration agreements are enforced "according to their terms." *Volt*, 489 U.S. at 478-479.

Moreover, requiring class procedures in arbitration where they are not consensual would violate the FAA's other primary purpose—"encourag[ing] efficient and speedy dispute resolution." *Dean Witter Reynolds*, 470 U.S. at 221. Consistent with the "national policy favoring arbitration," *Buckeye Check Cashing*, 546 U.S. at 443, the FAA was meant to promote "streamlined proceedings and expeditious results," *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) (quotation omitted). But imposing class procedures on arbitration would replace the advantages inherent in bilateral arbitration—informality, inexpensiveness, efficiency—with "procedural formalit[ies]" that "make[] the process slower [and] more costly." *Concepcion*, 563 U.S. at 348-49. In short, this would "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 344. That is why "express contract provisions permitting arbitration on a class basis are rare." Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1160 (2011); *see also* Larry R. Leiby, *Class Arbitrations Under Attack—But Survive*, 7 No. 1 Journal of the American College of Construction Lawyers 4 (Jan. 2013) ("An arbitration agreement or clause that expressly provides for class arbitration would be rare. The author has never seen one.").

As explained more fully below, the panel held that the parties must proceed to class arbitration based solely on routine contractual language of the kind found in any arbitration agreement—that is, without "a contractual basis for concluding that the part[ies] *agreed* to [class procedures]." *Stolt-Nielsen*, 559 U.S. at 684. "The panel's conclusion [thus] is fundamentally at war with the foundational FAA principle that arbitration is a matter of

consent." *Id.* at 684. On top of that, the panel's decision is inconsistent with the national policy in favor of arbitration. *Concepcion*, 563 U.S. at 339.

A. The Decision Below Is A "Palpable Evasion" Of *Stolt-Nielsen*.

As noted above, *Stolt-Nielsen* makes clear that courts and arbitrators may not infer "[a]n implicit agreement to authorize class-action arbitration ... solely from the fact of the parties' agreement to arbitrate." 559 U.S. at 685. "[T]he FAA requires more." *Id.* at 687. The Court left open in *Stolt-Nielsen* how much more is required. *Id.* at 687 n.10. But as Petitioners put it, the panel majority "resolv[ed] the question left open in *Stolt-Nielsen* in a manner fundamentally incompatible with *Stolt-Nielsen* itself." Pet. 13.

The panel relied on three provisions of the arbitration agreement in holding that the parties must proceed to class arbitration. Specifically, the panel relied on Respondent's waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company" and "any right I may have to resolve employment disputes through trial by judge or jury," as well as his agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." Pet. App. 3a.

But these provisions do nothing more than replace litigation with arbitration as the parties' mechanism for dispute resolution—by waiver of the right to go to court and resolve disputes via a jury (or bench) trial. Every arbitration agreement does at least this; indeed, "a waiver

of the right to go to court and receive a jury trial" is "the primary characteristic of an arbitration agreement." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427. Petitioners thus are correct to point out that, if these routine provisions "were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration." Pet. 13.[2] That is, the opinion in practice creates a default rule that ordinary arbitration agreements result in class arbitration unless the parties expressly disclaim this result. The Ninth Circuit has thus inverted the holding of *Stolt-Nielsen*.

Judge Fernandez was accordingly correct to describe the panel majority's decision as a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. Indeed, the panel's (mis)application of *Stolt-Nielsen* would reduce that important precedent to a practical nullity. Pet. 13. *Stolt-Nielsen* would have no effect—except for in the rare case where parties stipulate that contractual silence on the issue of class arbitration means "there's been no agreement that has been reached on that issue." 559 U.S. at 668-69 (quotation omitted); *see* Pet. App. 2a.

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2. As Petitioners explain, the canon construing ambiguous contract language against the drafter has no effect here. *See* Pet. 18-19. "[T]he reach of [that canon] must have limits, no matter who the drafter was." *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 470 (2015). The key limit here, of course, is that the relevant contract language must be ambiguous. But the provisions relied upon by the panel are "not ambiguous." Pet. App. 5a (Fernandez, J, dissenting). Given a proper reading, the agreement "demonstrat[es] the parties' intent to engage in traditional, bilateral arbitration." Pet. 14.

B. The Panel Decision Also Runs Afoul Of The Liberal Federal Policy Favoring Arbitration.

As explained above, the panel violated *Stolt-Nielsen*'s rule that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. at 684. By requiring class arbitration where it is not consensual, the panel also ran afoul of the "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (quotation omitted).

As the Court has emphasized, "[its] cases place it beyond dispute that the FAA was designed to promote arbitration." *Id.* at 345. To the point, the Court has repeatedly remarked that the "prime objective" of arbitration to "achieve streamlined proceedings and expeditious results," *Preston*, 552 U.S. at 357-58 (quotation omitted), and that this is why parties choose arbitration as a means of resolving their disputes, *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *see also Mitsubishi Motors*, 473 U.S. at 633 ("[I]t is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.").

As the Court explained in *Concepcion*, requiring classwide arbitration where it is not consensual interferes with the fundamental attributes of arbitration and undermines its prime objectives. "[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality." 563 U.S. at 348.

Indeed, "class arbitration *requires* procedural formality." *Id.* at 349. It thus makes dispute resolution "slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. By shifting to class arbitration, then, "the expedition, informality, and cost-savings of traditional bilateral arbitration are lost." Pet. 25.

At the same time, shifting to class arbitration "greatly increases risks to defendants," *Concepcion*, 563 U.S. at 350—because of the sharply limited judicial review inherent in arbitration. As the Court has noted, "[t]he absence of multilayered review makes it more likely that errors will go uncorrected." *Id.* Parties are willing to accept these errors when "their impact is limited to the size of individual disputes" and "outweighed by savings from avoiding the courts." *Id.* But when faced with the prospect of damages aggregated among thousands of claimants, the risk of error becomes to great to bear. *Id.* ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

Class arbitration thus negates the chief advantages of arbitration and magnifies its disadvantages. It is "not arbitration as envisioned by the FAA." *Id.* at 351. Rather, it "is a worst-of-both worlds hybrid of arbitration and litigation." Pet. 25. Accordingly, the imposition of class procedures (where it is nonconsensual) flouts the FAA and its federal policy in favor of arbitration.

II. Summary Reversal Is Warranted.

"No one denies that lower courts must follow this Court's holding[s]." *DirecTV, Inc. v. Imburgia*, 136 S.

Ct. 463, 468 (2015). Thus is true in FAA cases, just the same as in all other areas of the law. *See id.* Accordingly, when lower courts fail to apply this Court's decisions interpreting the FAA, the Court has not hesitated to intervene. *See Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28; *Imburgia*, 136 S. Ct. at 468-71. In fact, the Court has summarily reversed "several times in recent years to set aside manifest failures by lower courts to adhere to this Court's arbitration rulings." Pet. 27. *See Nitro-Lift*, 568 U.S. 17; *Marmet Health*, 565 U.S. 530; *Cocchi*, 565 U.S. 18; *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam).

Summary reversal is undoubtedly "strong medicine." *Dudley v. Stubbs*, 489 U.S. 1034, 1039 (1989) (O'Connor, J., dissenting). But this is one of those cases in which that medicine is needed. The relevant law "is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Eugene Gressman et al., Supreme Court Practice 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also id.* at 352 ("[T]he Court has shown no reluctance to reverse summarily a ... decision found to be clearly erroneous."). And this is not the first time the Ninth Circuit has failed to properly apply the FAA and this Court's precedents interpreting it. *See, e.g., Concepcion*, 563 U.S. 333; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

Summary reversal is especially warranted given the judicial hostility to arbitration exhibited by the court below. Pet. 27 ("It is hard to imagine a result more inimical to the strong federal policy favoring arbitration embodied by the FAA."). As Judge Fernandez aptly put it, the Ninth Circuit's decision is a "palpable evasion of *Stolt-Nielsen*,"

App. 5a (Fernandez, J., dissenting). Indeed, the panel "underruled" *Stolt-Nielsen*, rendering it a nullity within the Ninth Circuit. *See supra* p. 8. Lower courts, of course, are not permitted to nullify this Court's precedents. Although they are "free to note their disagreement with a decision of this Court," *Imburgia*, 136 S. Ct. at 468, they nonetheless must follow it. Only "'this Court [has] the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

If left uncorrected, the panel decision would undermine the enforcement of arbitration agreements throughout the Ninth Circuit. Defendants across the nine States within the circuit who have entered into "garden-variety arbitration agreements like the one in this case ... will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment." Pet. 26-27.

Worse still, decisions like the one below, if left unchecked, allow judicial hostility to arbitration to persist elsewhere and may green-light other circuits to engage in similar hostility against the FAA. This would upset the uniform, faithful application of the FAA that is critical to *amicus* and its members.[3]

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3. An additional factor weighing in favor of summary reversal is the panel's issuance of its decision as an unpublished memorandum disposition. Pet. App. 1a. Given the presence of a dissent—particularly one that deemed the panel decision contrary to this Court's precedent—the decision was clearly a contestable one and cannot fairly be passed off as a routine application of settled precedent. This Court should not allow an "unpublished"

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for certiorari and summarily reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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designation to insulate such contestable and important holdings from further review.